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FILED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A.D. 1960

No. 436

U S MACHINERY MOVERS

Petitioner

vs.

JOHN P BELLER, TRUSTEE
BISHOP MFG CO

Respondent

Petition For Writ Of Certiorari To The
United States Court of Appeals
For The Eighth Circuit

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JOHN P. BELLER, TRUSTEE, BISHOP MFG. CO.,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit.

To the Honorable, the Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioner, U. S. Machinery Movers, prays that a writ of certiorari issue to review a judgment of the U. S. Court of Appeals for the Eighth Circuit, affirming an order of the U. S. District Court for the Southern District of Iowa, affirming an order of the Referee in Bankruptcy, disallowing a claim of petitioner, in the Reorganization proceedings of Bishop Manufacturing Co. The company will be referred to herein, as in the opinion of the Court of Appeals, as "Debtor".

In Re: Opinion Below.

As of date of this petition, the opinion below had not been reported, as of 279 F. (2d) advance sheet No. 5. It is set out in the Appendix, page 23, with the judgment of the court on page 29.

Jurisdiction.

The opinion and judgment of the Court of Appeals were filed on June 27, 1960. The jurisdiction of this court is invoked pursuant to Title 28, sec. 1254(1); sec. 2101(c); and, Rule 19 of this court.

Questions Requested to be Reviewed.

I. Re: Illegal Taking of Property by Sheriff in Replevin; Conversion; Violation of Due Process Amendments.

(a) The right of a county sheriff to take goods in replevin where the goods were not listed in the suit pleadings, nor in the writ, nor replevin bond; and, did either he or the court there acquire jurisdiction over such goods.

(b) The right of the replevin-plaintiff, debtor, to take the unlisted cargo goods from the Sheriff.

(c) Whether such taking by the Sheriff and or the debtor of the unlisted goods is conversion; and, in violation of the due process clauses of the 5th and 14th Amendments to the Federal Constitution.

II. To Interstate Commerce.

Under these circumstances whether there may be violation of, at least the spirit, of Article I, sec. 8, clause 3, of the Constitution, providing for regulation of commerce between the several States; and, of Article IV, sec. 2.

III. To Bills of Lading, Liens, and Commerce.

(a) Whether this court has the right or power to hear and interpret a State Artisans Lien statute where claimant is from another state, other than where the claimed work and services were done.

(b) Whether this court has jurisdiction to hear and determine whether goods loaded and shipped subject to Bill of Lading, with COD provisions, constituted lien, under theories of Interstate Commerce being affected or Equity in Bankruptcy proceedings, or both.

IV. Jurisdiction of Bankruptcy and Federal Courts; Res Adjudicata.

(a) Whether State court finding of right of property as to goods listed in a replevin suit, being a small part, approximately 18% of the total cargoes, is res judicata to these courts as to the unlisted balance, and with respect to which balance no hearing had been had nor any evidence adduced in the State court.

(b) The extent of jurisdiction of bankruptcy courts to hear, reconsider, and determine claims under such circumstances, in plenary, law or equity, proceedings, pursuant to Title 11, sec. 11, the opening paragraph and clause (2).

(c) The extent of plenary jurisdiction to bringing in additional parties who may be necessary for the complete determination of a controversy, pursuant to section 11,

clauses (6) and (15), to issue process, in this case to bring in the sheriff in the replevin suit, the surety on the bond and others as may be reasonably necessary for a full hearing and determination.

(d) The extent of jurisdiction to hear claims to lien pursuant to section 96(b).

(e) Whether duty devolves on the bankruptcy courts to hear plenary testimony, law or equity, and evidence as to proof of claims where no finding as to the property concerned had been made in the previous court.

(f) The propriety of orders by the Referee and the District Court finding that evidence had been taken, when, in fact none had been, in either court.

V. Suggestions as to Procedure in Preparing Records.

To what extent counsel for appellants should decide what pleadings, documents, exhibits and the like shall be set out in the record; the extent of right to summarize same, and the right to decide which docket entries are relevant in each particular case.

Constitutional Provisions, Rule, State Statute.

U.S. Constitution:

5th Amendment: "* * * nor shall any person be * * * deprived of * * * property, without due process of law."

14th Amendment, Sec. 1: "Nor shall any State deprive any person of * * * property, without due process * * * nor deny to any person within its jurisdiction the equal protection of the laws":

Art. 1, sec. 8, clause 3, re: power of Congress "to regulate commerce * * * among the several states * * *."

Art. 4, sec. 2: "The Citizens of each State shall be entitled to all privileges * * * of Citizens in the several States."

Title 11, Sec. 11: "The courts of bankruptcy * * * the district courts * * * are invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * (2) reconsider allowed or disallowed claims * * * (6) bring in * * * additional parties * * * when necessary for the complete determination of a matter in controversy * * * (15) issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement * * * of this title".

Title 11, sec. 96, Preferred creditors, (b) referring to liens as contrasted to preference. We feel this reference sufficient herein, its purpose being to show that the Bankruptcy court has jurisdiction over lien claims.

Rule 19, of this court: * * * (b) where a court of appeals has * * * decided important state * * * questions in a way in conflict with applicable state * * * law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision".

Iowa Code Annotated, Sec. 577.1 Artisans' Lien: "Any person who renders *any* service or furnishes any material in the making, repairing, improving or *enhancing* the value of any inanimate personal property, with the assent of the owner, express or implied, shall have a lien * * *" (our emphasis)

Statement of the Case

Petitioner is in the business of dismantling, loading, moving and reassembling machinery, presses and the like. Such work is solicited at auction sales, and it is the usual practice to obtain permission both from the purchasers and the auctioneer before undertaking such work, because title must be obtained through the auctioneers. Purchasers or movers may arrange for transport of such handled goods, the movers rarely being general carriers.

(a) At the sale in this case, debtor Bishop purchased certain 20 lots at the gross price of $9,985.00 (R. 9, 51). Petitioner-claimant had solicited the jobs, and in the dispute here debtor claimed petitioner had had no authority to handle his purchases (R. 16, 19, 20, 79). Petitioner dismantled and loaded debtor's goods on 3 trucks of the P & W Truck line, and on one of debtor's, obtained signed bills of lading, C.O.D. charges to be collected at destination, debtor's place of business in Clarindia, Iowa (R. 8, 9, 10, 14, 41). Debtor filed replevin suit in the District Court of Page County, Iowa, listing therein a certain crane and parts (R. 1, 2, 22), being only part, about 18%, of the entire handled cargoes. Writ and bond were filed only as to the particular crane and parts.

(b) Amended petition was filed, also only as to the same crane and parts, claiming damages for detention, loss of use and physical damages in sum of $4942.93 (R. 3). Trial was had without jury on the amended petition, answer of petitioner here, and reply of debtor. The decree of November, 1954, found property of said crane and parts in debtor-plaintiff, with costs, but no damages of any kind. No reference was made in such decree as to the rest of the cargoes. No appeal was taken therefrom (R. 7, 8).

(c) Thereafter, in January of 1955, petitioner filed suit in the U.S. District Court, in Des Moines, Iowa, civil action No. 2-574, alleging conversion of, at least, the cargoes not listed in the replevin suit, which were seized by the Sheriff and surrendered to debtor who took possession of same (R. 8, 9). The latter two, the truck line and the surety company on the bond were the defendants. Plaintiff claimed lien against all the cargoes (R. 11, 12). Requests for admissions pursuant to rule 36 were filed by plaintiff, with answers filed (R. 39, 40, 41). Pretrial order was entered (R. 49, 50; 51) but the case was dismissed by the Court on the ground that the necessary amount in controversy was lacking (Nov. 14, 1955).

(d) The reorganization proceedings followed in April of 1956, where petitioner filed its claim with verified statement in support, making the same claims for lien and conversion, and also asking for the same relief as above in (c) (R. 53-4-5-6 7-8). Trustee filed objections, and the claim was disallowed. No evidence had been presented in support of or contra to such claim, neither counsel nor petitioner claimant had at any time appeared before the referee, counsel filing a Statement. Nevertheless, the referee stated in his order of disallowance that evidence had been taken, and that the judgment by the Page County court was res judicata (R. 61-62). Petition for review was filed in which petitioner stated that no evidence had been taken, and questioned the res judicata finding (R. 62-3). The District Court upheld the referee, holding that petitioner did not improve the machinery, did not have any lien; that the ruling of the referee was justified "under the law and evidence", and that the judgment of the Page County court was controlling there (R. 65-6).

(e) Appeal followed to the Eighth District and for con-

venience we have designated the paragraphs in the opinion with letters. We feel the last paragraph of (e): "We can think of nothing of less concern to that court (U.S. District) than whether appellant has enforceable claims against complete strangers to the reorganization proceedings" is of particular importance, as we will try to show below. The opinion approved of the rulings with respect to res judicata.

Reasons for Granting the Writ

I. Re: Illegal Taking of Property by Sheriff in Replevin; Conversion; Violation of Due Process Amendments

(a) From the beginning of these extensive litigations, petitioner-claimant complained of the taking by both the sheriff and debtor, under guise of replevin, of property which were not listed in any of the pleadings, nor in the writ nor the replevin bond. (Page County, R. 3, 4). Examination of the relevant docket entries (R. 71 through 76) shows no evidence was taken at any time, thus all orders were based on pleadings and statements of counsel only, in addition to memoranda of law and facts which were filed; not in the record.

(b) There can be no doubt that the Sheriff grossly exceeded his authority in seizing property not listed in the replevin proceedings. This is fundamental, for he can only take or attach that which the legal process calls for. He violated the basic concepts of the due process clauses of both the 5th and 14th Amendments. He and the debtor are both guilty of outright conversion, and, the acts of debtor follow the trustee-respondent. 77 C.J.S.* 67, 72, 103;

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*(C.J.S. references are to Corpus Juris Secundum).

volume 80, page 228, are authority that the Sheriff may be personally liable for such acts, for failure to follow legal directions (p. 230), and for making wrongful levy or other taking of property under color of legal process (p. 236).

(c) The language of the 14th Amendment, we feel, is particularly striking under these circumstances: "nor shall any State deprive any person * * * nor deny any person within the jurisdiction * * * equal protection * * *", for the Sheriff represents the Executive branch in the State in our system of Government. His conduct as a public official, on whose shoulders rest to such an important degree the enforcement branch, was plainly inexcusable. He violated his oath of office, his serious duty to protect the public involved in legal proceedings. In short, his actions if unchecked, would result in sheer dictatorship. He violated due process in his taking of private property without legal process having first issued therefor. He has no right to take any property without the proper legal writ, due process.

(d) On 12 September 1960, in Washington, in connection with the annual meeting of the American Bar Association, the National Conference of State Trial Judges convened. As reported in the local Chicago Law Bulletin, Judge Leslie L. Anderson of Minneapolis made the following remarks:

> "Trial Judges of any State are the root, trunk and branches of the judicial system who bear the greater influence and responsibility in dispensing justice", that only a few cases move to appellate courts, and arguing that insofar as pay is concerned, scales should be the same.

While there undoubtedly would be difference of opinion as to the latter statement, none will disagree that the trial

judges are "root, trunk and branches." So, likewise, th enforcement officers locally are the root, trunk an branches, yes, the very heart of our enforcement, exec tive, branch of our governments throughout our nation: a the very grass-roots, where the greatest number of ci zens are affected, and so seriously concerned. To us, it simply unthinkable that none of the courts below even b gan to consider this. It is so serious, so dangerous, if n checked at once, at the heart, at the source, the gras roots. There is the soil where good citizenship, simple fa dealings should, must, be planted, cultivated, harvested. I is from this soil, properly and honestly handled, that a our public servants must come, to the very highest an most responsible. It is to them that all of us must loo for justice, even the world looks to these. The serious im portance of these events, their implications, their effec cannot, should not, be minimized.

(c) In the recent case of *Tourk* v. *Hall*, 168 NE (2nd), 305, Mass., advance sheet, 7-20-60, it was held th "In an action of trespass and conversion against a depu sheriff in levy and sale of property under an execution burden of proving justification was on the defendant." Continuing with 67 CJS. on pp. 218-9, is authority th the execution or attachment must be according to its ter date, and he is liable for an insufficient or defective le pp. 241-2; It is a tort, a wrongful act, 89 CJS 533; and a competent evidence is admissible to prove fraud or b faith, 77 CJS 136, and omission to give bond may subj him to suit, p. 72, It is submitted, that this reasoning w respect to omission to give bond is likewise applicab where, as in our case, *no bond* had been given in replevy property not listed in the proceedings. Our argument s to violation of due process and conversion is supported w

submit in 77 CJS 210; 89 CJS 548-9.

(f) The plaintiff in the replevin suit, debtor Bishop, is guilty of illegal taking of property he did not list in the suit, and which was surrendered or delivered to him by the Sheriff. In support we cite, in addition to the above authorities, 77 CJS 68, where it is stated that the plaintiff in replevin is bound by his own affidavit; on pp. 131 and 140 that the proceedings must specify the property to be taken; and, one who impairs the security of a lienholder by disposition of property subject to lien is liable in conversion, to the lienholder, citing cases. In further support is 16 Ia. Digest key 58 (p. 49, 1959 pocket part): "Plaintiff must allege particular description of property sought to be recovered, together with facts constituting his right to present possession."

II. To Interstate Commerce

Whether such conversion and illegal taking violates the Commerce Article makes for interesting cogitation. It is true the language provides for Congressional regulation, but in reading the annotations, volume titled Constitution Article 1, sec. 1, to sec. 9, page 202, is found the following discussions under note 3, Purpose: "This clause was designed to keep open commerce in goods, ideas and individuals". *O'Connel v. Kentejohn*, 1938, 179 So. 862. "This clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states, and in short, is a limitation upon the power of the states even without implementing legislation by Congress. *Freeman v. Hewit*, 67 S. Ct. 274, 1946". We realize this Article and the decisions annotated are not literally in point, but it is our

thought that the thinking behind them, fitted with the due process clauses, and the phrase in Article 4 "The Citizens of Each State shall be entitled to all privileges * * * of Citizens in the several States", manifest the underlying principles, namely preventing undue constriction to freedom of commerce between citizens of the several States.

(a) Here we have a situation where responsible business men from another state, Illinois, come to a sister State, Iowa, perform expensive services, involving expensive machinery and as expensive cargoes; and, with substantial expenditures for labor, who must be paid whether or not the businessman has collected for his services. It is a fairly simple matter, too simple in too many cases, for the purchaser of the goods for whom the machinery mover has so performed the services, for the trucker who transports, and, yes, the public official who takes the goods, to all act in collusion to avoid paying for the mover's services, by the expedient of attaching the cargoes via replevin proceedings. In this case, was there collusion? The accusation is justified, for while the goods, after dismantling and loading were in transit, it is very apparent that the replevin proceedings had already been in preparation, and filed, ready waiting when the trucks arrived at destination.

(b) The accusation is more justified when these astounding facts are considered: that, although some forty thousand dollars worth of valuable machinery, etc., was in transit, for which a twenty thousand dollar bond was required by Iowa law, only sixteen hundred dollars of machinery, etc., was listed in the replevin, for which only a thirty-five hundred dollar bond was furnished. These documented facts are eloquent, and plainly furnish sup-

port for petitioner's bitter, and justified, complaint that collusion and bad faith plainly existed here, on the parts of the plaintiff-debtor Bishop, and the Sheriff. We feel the trucking concern had no part.

(c) This, the interference with commerce aspect, is only second in importance, we feel, to the violation of due process. The loss of money to petitioner, the great amount of time taken in the defending, prosecuting, and other handling of this case, while serious enough, are not in the same orbit of comparison, for the heart of performance of part of our system of our Government is involved. Then, in importance, is that of commerce between the citizens of sister states. While it is not in the record in this case, since actually only pleadings are of record, we are representing the petitioner and the industry involved would very much like to have the privilege of discussing in argument to this court the economic loss to citizens of a state, because men in the concerned industry are exceedingly hesitant to take expensive machinery and costly labor there, for machinery moving, a highly specialized industry. One of the inevitable results, besides loss of business, loss of bonding, liability and compensation bonds, is that local people needing to have machinery moved, are thus compelled to use obsolete methods. Modern methods are more efficient, faster, and so important, safer.

III Bills of Lading, C O D., Liens

With respect to whether this Court has the right and power to rule on the Iowa Artisans' Lien statute, as well as on liens under the common law, under the circumstances and facts in our situation, we submit the reasoning in part II above in support. Similarly, we think our Bills of Lading with the C.O.D. provisions, involving commerce be-

tween states, ought to be ruled on by this court. In our brief in the court below, we set out extensive search on the law of liens, in addition to sec. 96(b) of the Bankruptcy Act. We felt it would have been an imposition on this court, to have set same out here, it being lengthy, more than 15 pages of printed brief. It included 13 CJS 235, 6; 80 CJS 963, Bills of Lading; 5 Words & Phrases 481; Uniform Sales Act, sec. 20(1) and (3); Nadler and Remington works on Bankruptcy. If this court so directs we should be pleased to either furnish copies of the brief or file new ones on these points or other points as may be directed.

(a) It is important, however, to point out that petitioner and other businessmen in similar positions must have such protection, the same as mechanics and like artisans. As argued above, especially where they are in foreign locales, the problems of collusion become acute. We were surprised with the finding of the District Court that petitioner "neither repaired nor improved said machinery. That it was not the intent of the legislature of Iowa to give the movers of machinery a lien, nor did the claimant have a lien under a bailment theory" (R. 65-66). This finding, we think it important to point out, was so made *without any evidence or testimony taken insofar as the unlisted machinery* was concerned. Thus, neither the Referee nor the District Court heard any details as to what work was actually done, what experts if any were required, what type of specialized equipment was used; and to be sure, why the work was so done, for what purpose or purposes, and whether the cargoes were benefited.

(b) The interesting questions thus arise; whether dismantling, moving, loading and or assembling of machinery at destination result in "improving" or "enhancing" such

equipment. In addition to the definitions of these words to be found in any good standard dictionary, Corpus Juris describes beneficial changes, 30 CJS 253; 42 CJS 416, 422, 450. Did not the work performed by petitioner "enhance" or "improve" the property? Here machinery had been purchased at an auction. In order for purchaser to make any use of same, whatever was contemplated, whether resale, or use in his plants, or improving and then using, no matter what was contemplated, the machinery had to be taken down, dismantled. It had to be removed from the premises of sale; it had to be taken apart; loading on instruments of carriage was required to take them away. In order to cart them away safely, the cargoes had to be properly loaded, including skidding or other means needed to ensure its safe staying in position while enroute. How can it be seriously questioned that these types of services fail to "enhance or improve?"

(c) Considering these arguments, the language of the Iowa statute takes its proper meaning: "Any person who renders *any* service or furnishes *any* material in the making, repairing, *improving or enhancing* the value of *any* inanimate personal property, with the assent of the owner, express or implied, shall have a lien" * * * (emphasis ours). It is earnestly submitted the courts below were in error in holding that petitioner's work and labor neither enhanced nor improved. We submit the legislature clearly included in these terms petitioner's services in the true and proper, liberal construction and meaning of such terms. It is fact that such purchased property were virtually useless until and unless such services were performed. Such services are needed, indispensable, in these circumstances.

(d) Further protection is given businessmen in the

position of petitioner, by C.O.D. provisions, in practice virtually throughout the civilized world of business and commerce. They have been described as "special contracts of transportation" 13 CJS 262, 383; and there may be liability in conversion, p. 385. The courts take judicial notice of the meaning of these abbreviations 31 CJS 650; 7a Words & Phrases, 87-8, citations. The bill of lading is a contract of bailment, 13 CJS 235; 80 CJS 903; it is evidence of title, pages 236-7; 5 Words & Phrases 481-3; Uniform Sales Act, sec. 20(1). Petitioner had enforcement right as of Carrier's lien, Iowa Code, 575.16, 577.1; 577.2. Lien is not lost unless so intended, nor is the lien divested where possession of goods are obtained by legal process, 13 CJS 789-90. There is a presumption against a waiver of lien, 53 CJS 863, and there is no waiver where property is taken involuntarily as by replevin, p. 864. It is discharged by proper and sufficient payment of the debt, p. 866.

IV. Jurisdiction of Bankruptcy and Federal Courts Res Adjudicata.

Did the ruling in the State Court, concerning approximately 18% of the total cargoes involved, the only part listed in the replevin proceedings, result in Res Adjudicata in the Bankruptcy and District courts *as to the rest of the cargoes which were not litigated, nor listed in the state court?* Does this court have the power to review such rulings of the Refered, the District Court, and of the Appeals Court, that it was Res Adjudicata? Under the law as we found in our research, and in our reasoning, we earnestly submit these courts were in error, and their rulings should be reviewed by this court. There is far more involved than what may appear at first to be simple disallowance of another claim in bankruptcy, especially where

no evidence nor testimony had been taken in either forum-court.

(a) Title 11, sec. 11, quoted above clearly gives the bankruptcy courts original plenary jurisdiction, in law and Equity; gives the right to bring in additional parties, issue process. We earnestly submit that, inasmuch as there had not been any trial or evidence taken in any court with respect to the unlisted cargoes, Res Adjudicata cannot apply, for is it not clear that the evidence adduced with respect to the cargo listed could not apply to unlitigated matters? There can well be different operations, different equipment needed as to different types of machinery, and here were four separate truck loads of different machinery parts. Does it not follow, therefore, that judgment with respect to the one cannot control the other, for that would be pre-judging without benefit of trial or testimony?

(b) In our case to properly rule as to the unlisted, unlitigated cargoes, the necessary witnesses should have been brought into open court, including claimant-petitioner, debtor, the sheriff, the trucking company as *necessary* parties. Then, if a judgment or verdict would have been obtained against the sheriff and or debtor, it follows that claimant would have had a right of action on the replevin bond. Therefore, to properly adjudicate all controversies necessarily involved in a single proceeding if at all possible, we submit by virtue of clauses (6) and (15), Title 11, these parties should have been brought in and heard in the bankruptcy court. This we submit, would have been efficient litigation, within the purview of modern practice. The statement in the opinion below, in the last sentence in the paragraph we have identified for convenience "(a)": "We can think of nothing of less concern to that (bankruptcy) court than whether appellant (petitioner) has enforceable

claims against complete strangers to the reorganization proceedings" we submit, is serious error. For, to begin with, there is property of the debtor involved with respect to which no trial-hearing had been had. All these parties are far far from "strangers", they are first-hand participants, with first-hand knowledge. They are the very antithesis of strangers, essential parties to any such trial.

(c) Title 11, 96(b) plainly provides, among other provisions, for hearings as to liens, and both Nadler and Remington have written a great deal on the subject. We are certain other writers have also. The bankruptcy court, therefore, has the unquestioned power to hold hearings thereon. We think the *sworn* statement of petitioner in support of its claim filed in the bankruptcy court ought to have serious consideration.

(d) There are other reasons why Res Adjudicata does not apply. Paragraph (i) sub-paragraph 6 of the opinion quotes the finding of the Page County court, noting that no appeal was taken from that decision, ignoring the fact that that judgment concerned *only* the listed crane and component parts, approximately only 18% of the total cargoes. The total value of the four truckloads was $9,985.00 (R. 50-1); the value of the listed crane $1600.00 (R. 1, 23); the bond $3500 (R. 1) twice its value as listed as required by Iowa law. Thus, of record, no evidence of any kind was had, nor proceedings filed with respect to more than 80% of the goods concerned. How, then, can Res Adjudicata apply? The subject is thoroughly discussed in 50 CJS, 182, where it was held that "Recitals of a judgment are conclusive only as to the issues involved." When matters are not in issue they are not so affected, and

the judgment is not an estopped as to rights which accrue thereafter, and which were not involved in the suit, pp. 218, 220, 258. Judgment in replevin as to part of goods will not bar proceedings as to other; is not res judicata as to matters not in issue and not determined, p. 259; applies only to the same cause and the same parties, p. 260. Special reference is herewith made to the annotations in Title 11, Sec. 11, pages 53-4 as to Exclusiveness of jurisdiction of bankruptcy court, note 8; note 10, page 56 as a court of Equity, and note 34, page 74, as to liens.

(c) In 4 Remington 108; we find: Actions may be split to protect mechanics and materialmen; a matter is not res judicata simply because it might have been included in the adjudication of a disposed of claim, if in fact it was not necessarily involved, p. 104, footnote. On p. 124: Federal court's are entitled to assert federal laws and Constitution in matters properly in their orbit; p. 131-2, the court retains jurisdiction over property for completion of proceedings relating to it, and has jurisdiction over the res; the bankruptcy court may in a plenary suit determine all rights between all concerned, pp. 276-7; and has jurisdiction over all property in its possession, p. 281. It follows, that the conversions by the principal-debtor carries over to the trustee, since he acts in place of debtor.

(d) Petitioner-claimant is entitled to damages, 77 C.J.S. 157, 191, 202, 205, 209; to attorneys' fees where there has been fraud, malice, oppression or willful wrong, p. 206; to exemplary damages, pp. 206-7, 211, 228-9; 89 C.J.S. 660; 40 Iowa Code, Secs. 643.16, 643.17. There is liability on the bond; discharge of the principal in bankruptcy will not discharge the surety, 77 C.J.S. 224; nor is the surety released from liability by dismissal of the replevin action, same page. Purpose of bond, inter alia, is to protect and

indemnify defendant in the event he may be entitled t
damages and costs, p. 71. We note that petitioner here wa
defendant in the replevin proceedings. And, liability o
bond in replevin accrues whenever there is a breach of an
of its conditions, 77 C.J.S. 212; where there is a defectiv
bond, p. 144. Mr. Nadler, on p. 152, writes that the lien, a
here, is a preferred claim and looks to the property fo
satisfaction of the debt; and, if the property is insufficient
creditor has a claim against the estate for the deficiency
The trustee is not an "innocent purchaser" but takes prop
erty subject to all valid liens, p. 586. And, the Iowa statut
5772, provides for Equity proceedings.

(g) We must make special note of the errors in the or
ders of the Referee and the District Court stating that ev
dence had been taken, when in fact none had been, as s
out above in (d) and (e) of our Statement of Case. In thi
connection we referred in our brief below to the following
in the answer filed by debtor to our request for admissio
under rule 36, he stated in his paragraph number 1-I (R
45): "Defendant admits * * * plaintiff did assist in loa
ing certain property on the truck of Bishop, and on t
trucks of P & W, same was done in disregard of the po
tive orders of this defendant (debtor here) and against t
will and consent of this defendant". This plaintiff we ad
is petitioner here. Petitioner, in its statement in suppo
of claim, filed in the Bankruptcy court, referred to this
proceedings, but neither court it seems to us either e
amined this part of the record nor gave it its true implic
tion, as we see it. We consider this admission as follow
keeping in mind that such expensive machinery was i
volved, which alone would cause a responsible busine
man to well hesitate before handling same, in any manne
without some approval at least, when Bishop-debtor a

mits that claimant-petitioner "did assist" in loading, does that not at least indicate "approval", per se? For, how can anyone "assist" without express or implied permission? To us the answer seems obvious, there *had* to be some form of permission, thus complying with the Iowa lien code. If there may have been a question, then it surely was the duty of the referee to go into that point. Not only did he not do so, but he committed what to us is grievous error in stating in his order that evidence had been taken. For these reasons alone, we submit, there was denial of due process, and especially so when the other facts are considered.

V. Suggestions to Preparation of Records.

These have no bearing on the outcome of the case here, but as it so happens that just recently meetings had been had to improvements of procedures, we would like to take the opportunity of making several suggestions. First, we feel that counsel handling appeals generally must be considered responsible, and therefore they know what pleadings, documents, exhibits, etc., ought to be in the record for a proper review of the case. Second, they should be given full leeway in summarizing any papers, for we must recognize that opposing counsel is watching and also have the right to file additional abstracts of records. Then, as in the case here, there is no question that of the more than five printed pages, in the record, of relevant docket entries, less than one-half page actually applied to this case. We sincerely submit these suggestions. An examination of the record clearly shows much immaterial matter, of which we had no choice as to including same. The record would have been reduced by at least one-half, with nothing essential missing.

Conclusions.

To conclude we would like to repeat what we argued in our brief: the trustee, acting in place of debtor, has no proper ground for complaint insofar as strictly res judicata is concerned; for, it was debtor who filed the replevin proceedings; it was he who chose the forum; it was he who willfully failed to list all the machinery in the suit and who willfully failed to submit the unlisted goods to the jurisdiction of the court he chose. For these reasons alone, the plenary Equity jurisdiction of the Bankruptcy court should take over. Petitioner directly due to such illegal acts on the parts of both the Sheriff and debtor has suffered (1) in not being paid for its work; (2) in being compelled to defend and prosecute involved long drawn-out proceedings; (3) incurred heavy expenses and expended a great deal of time. Petitioner is therefore entitled to his money plus interest, damages, costs and counsel fees.

Petitioner respectfully asks that Equity be done, as should be done. We earnestly ask that this court reverse the judgment of the court below, with instructions to return this cause to the trial court to hear fully the evidence and witnesses in this case and give petitioner its just due or for such other directions as the equities of the case shall to this court deem just, under the circumstances.

Respectfully submitted.

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Paul L. Baikoff,
Of Counsel.

Appendix

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Caption No. 16339

[June 27, 1960.]

Before SANBORN, MATTHES *and* BLACKMUN, Circuit Judges.
SANBORN, Circuit Judge.

This is an appeal from an order of the District Court filed October 26, 1959, affirming an order of the Referee in Bankruptcy of May 13, 1959, disallowing a claim of U. S. Machinery Movers, a copartnership (appellant), filed in Proceedings for the Reorganization of Bishop Manufacturing Co., Debtor. The debtor will be referred to as "Bishop". In its "Proof of Debt," the appellant alleged that Bishop owed it "$1742.50, plus damages and costs;" and that "the average due date of said debt is on or about July 23, 1951." The affidavit of Milton Levinson, a partner, in support of appellant's claim, states that the services upon which the claim is based were rendered in July of 1951 in connection with the loading and transporting, within the State of Iowa, of machinery and equipment belonging to Bishop, and that the appellant claimed a statutory lien upon all of the machinery for its services, but had been unable to collect its charges or to establish its lien.

The record on appeal contains copies of the following papers from the files of the District Court of Page County, Iowa, in connection with a replevin action brought by Bishop against appellant and P. & W. Truck Line on July 26, 1951: A writ of replevin issued July 26, 1951, directing the Sheriff of Page County to take a seven and a

half ton crane from the appellant and P. & W. Truck Line and deliver it to Bishop; the petition of Bishop for the writ; the appellant's answer to the petition for the writ; amendments to the petition; the appellant's "Reply to Amended Petition, and Claims for Liens"; Bishop's reply to appellant's answer and to appellant's "Reply to Amended Petition, and Claims for Liens"; the order and decree of the State District Court, filed November 15, 1954, reading in part as follows:

> "The Court, now being fully advised in the premises, finds that the defendant, U. S. Machine [Machinery] Movers, was not employed by the plaintiff to dismantle and load the crane which was taken under the writ in the within replevin action; and the Court further finds that the defendant, U. S. Machine [Machinery] Movers, failed to plead or prove any indebtedness due it under the theory of quantum meruit that will give it any lien upon said crane.
>
> "The Court further finds that the plaintiff, Bishop Manufacturing Co., is the owner of said crane and was and is entitled to the immediate possession thereof.
>
> "It is Therefore Ordered By The Court that the plaintiff, Bishop Manufacturing Co., be and it is hereby, granted the immediate possession of said crane, and judgment is hereby entered in favor of the plaintiff and against the defendant for the costs of the action, taxed at $39.14.":

and a supplemental decree of that court, filed November 23, 1954, correcting the name of the appellant.

The record also contains copies of papers from the files of the United States District Court for the Southern District of Iowa in a diversity action brought by the appellant against Bishop, the P. & W. Truck Line, Ed Hurley, Sheriff of Page County, Iowa, and Mutual Surety

Company of Iowa, seeking a determination that appellant had a lien upon the machinery of Bishop which was loaded and transported in July of 1951; that the P. & W. Truck Line was guilty of conversion in surrendering the machinery to Bishop; that the Sheriff was similarly guilty of conversion; that Bishop was obligated to return the machinery to the appellant, or, in lieu, to pay it the fair market value; and that, if Bishop, the Truck Line and the Sheriff should fail to accord the appellant the relief prayed for, the Mutual Surety Company of Iowa be declared liable on the bond filed in the replevin action. The record contains a copy of an "Order on Pretrial Conference," dated November 14, 1955, reciting certain agreements said to have been reached by the parties in contemplation of having to try the diversity case brought by appellant; and a copy of a judgment filed on the same day dismissing the case for lack of jurisdiction, the necessary amount in controversy being absent.

It is apparent that the appellant believes that the court of bankruptcy has jurisdiction to determine not only whether the appellant has a claim against Bishop, provable in the reorganization proceedings, but also whether appellant has causes of action for conversion against the P. & W. Truck Line and the Sheriff of Page County, and a possible contingent claim against the surety which had in 1951 written the replevin bond. In his statement in support of appellant's claim, Milton Levinson asks that the Truck Line, the Sheriff and the Surety Company be made parties defendant in the Court of bankruptcy. We can think of nothing of less concern to that court than whether appellant has enforceable claims against complete strangers to the reorganization proceedings.

The order of the Referee in Bankruptcy disallowing the claim of the appellant was entered May 13, 19[illegible]. It reads as follows:

> "The claim of U. S. Machinery Movers having been heretofore filed herein in the amount of $1,742.50 plus damages and costs and John P. Beller, trustee of the above debtor, having filed objections thereto and said claim and objections having been duly assigned for hearing by order entered March 11, 1959, in this matter, and said claim and objections now coming on for hearing before the undersigned, and said claimant appearing by its attorney Irving Eisenberg and said trustee appearing in person and by A. L. Wensel his counsel, and the court having heard the evidence and considered the statements of counsel and being fully advised in the premises, finds:
>
> "1. That on the 16th day of November, A.D. 1954 this claim was litigated in the District Court of the State of Iowa in and for Page County and that said claim is now res judicata.
>
> "It Is, Therefore, Ordered that the claim of said claimant be disallowed in full."

On July 10, 1959, nearly sixty days later, the appellant petitioned the District Court for a review of the Referee's order. This was out of time. The ten days allowed by 11 U.S.C.A. § 67(c) for the filing of a petition for review had not been extended, and therefore the appellant as a matter of right was not entitled to have a review of the Referee's order. However, the District Judge could entertain the appellant's belated petition for review if he saw fit to do so. See *Pester v. Northern Illinois Finance Corp.*, 317 U.S. 144, 152-153; 6 Am. Jur., Bankruptcy, § 1518, page 1529. He did entertain it, and on October 26, 1959, after a hearing, made the following findings:

> "1. That the Court has jurisdiction of the parties and subject matter hereto.

"2. That under the laws of the State of Iowa the claimant had no statutory lien for moving machinery since under the Iowa law no lien is given for such services.

"3. That the claimant neither repaired nor improved said machinery.

"4. That it was not the intent of the legislature of the State of Iowa to give the movers of machinery a lien, nor that the claimant have a lien under a bailment theory.

"5. That the ruling of the referee in bankruptcy in this matter was justified under the law and evidence in this case.

"6. That the District Court of the State of Iowa in and for Pike County in a replevin action between the same parties held that the claimant was not entitled by the debtor to dismantle the engine and move the machinery to Clarinda, Iowa, and that the claimant had no lien for its services. The remedy of the claimant if not satisfied with the ruling of the Iowa District Court was to have appealed.

"7. That the claim of the [illegible] Machinery Movers should be disallowed."

and ordered "that the claim of the [illegible] Machinery Movers be and is hereby disallowed and the costs are assessed to said claimant."

We cannot determine from the transcript on appeal furnished to the appellant whether we have before us exactly the same factual situation upon which the Referee in Bankruptcy based his order, and the identical record which was before the District Judge when he affirmed the Referee and ruled that the claim of the appellant should be disallowed.

Under [illegible] of the Rules of Practice in Bankruptcy the Referee is required to prepare promptly and transmit to the

clerks certificates on petitions for review of orders made by them [the referees], together with a statement of the questions presented, the findings and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits." 6 Am. Jur. Bankruptcy § 1722, page 1530. Such a certificate or report of a referee is a requisite for review of an order made by him.

From the Clerk's "Relevant Docket Entries" in the record on appeal, it appears that on August 6, 1959, the Referee filed a "Certificate on Petition for Review," which we must assume related to the petition filed by appellant, since it would otherwise be an irrelevant docket entry. The Referee's certificate is not found in the record. The appellant's record on appeal is deficient in that regard.

Order 47 of the General Orders in Bankruptcy, 11 U.S.C.A. foll. § 53, requires that the report of a referee shall contain his findings of fact and conclusions of law and that the judge shall accept the referee's findings of fact unless clearly erroneous. Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., (which, by virtue of General Order in Bankruptcy 37, is applicable to proceedings under the Bankruptcy Act) requires that the court shall find the facts specially and state its conclusions of law thereon. Our understanding is that a district judge called upon to review a referee's order, is entitled to have from the referee an adequate and accurate statement of the facts and the law upon which he relied in making his order. It is also our understanding that, when an appeal is taken from an order such as that here involved, the Court must have a record which discloses the exact factual and legal basis for the order under review. See and compare, *In re Rockford Baseball Club, Inc.*, 7 Cir., 201 F.2d 685; *In re Cesare*, 7 Cir., 217 F.2d 424, 427-428.

From the record before us, we have no hesitation in saying that the conclusion of the Referee and of the District Judge that, under Iowa law, the appellant had, and has, no lien upon the machinery and equipment it loaded and transported in July, 1951, was a permissible one. It does not conclusively appear, from the record as presented, that the appellant may not have been entitled to the allowance of an unsecured general claim, assuming that the claimed services rendered Bishop in 1951 were at its request. The burden of demonstrating error is upon the appellant and not upon the trustee for the debtor. The Referee and the District Judge are both of the opinion that the judgment of the District Court of Page County, although it dealt with services rendered with respect to only part of the machinery transported by appellant in July of 1951, was res judicata of the issue of the appellant's having been employed by Bishop to render services in respect of the loading and transportation of all the machinery of Bishop. We find no adequate basis for a ruling that the appellant has any allowable claim, and no justification for remanding the case for further proceedings.

The order appealed from is affirmed.

A true copy.

Attest: (signed)

Clerk, U. S. Court of Appeals, Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1960.

No. 436.

U. S. MACHINERY MOVERS,
Petitioner,

vs.

JOHN P. BELLER, Trustee, BISHOP MFG. CO.,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Circuit Court of Appeals, Eighth Circuit, is reported in [illegible] F. 2d [illegible].

JURISDICTION

The judgment of the Court of Appeals was entered on [illegible], 1960. The petition for writ of certiorari was filed [illegible], 1960. The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section [illegible] and Rule [illegible] of this Court.

STATUTES AND RULES INVOLVED

Jurisdiction of Appellate Court, Bankruptcy Act (U. S. C. A. Sec. 47 (e)):

The Supreme Court of the United States is hereby vest with jurisdiction to review judgments, decrees and or of the United States courts of appeals in proceedi under this Act in accordance with the provisions of laws of the United States now in force or such as hereafter be enacted.

Rule 23 of the Revised Rules of Supreme Court, petition for Certiorari:

4. The failure of a petitioner to present with accura brevity, and clearness whatever is essential to a ready adequate understanding of the points requiring consider tion will be a sufficient reason for denying the petition

Chapter 786, Exceptions, Sec. 7861, 1935 Code of Io Bill of Exceptions:

The office of a bill of exceptions is to make the proc ings or evidence appear of record which would not oth wise so appear.

Chapter 577, 1935 Code of Iowa, Artisan's Lien:

Sec. 5771. Nature of Lien. Any person who repa any service or furnishes any material in the making, pairing, improving, or enhancing the value of any ma made personal property, with the assent of the ow express or implied, shall have a lien thereon for the ag or reasonable compensation for his service and mate while such property is lawfully in his possession, w possession he may retain until such compensation is p but such lien shall be subject to all prior liens or en

STATEMENT OF CASE

petitioners statement of the case includes matters
do not appear in the record, the record being made up
ely of pleadings, and not being in chronological order,
em it expedient to set out our statement of the case
h includes proceedings for a writ of replevin in a dis-
court of Iowa, an action in the United States District
rt in Iowa and proceedings in bankruptcy, in the same
t.

espondent, Bishop Manufacturing Company, brought
action in replevin in by filing petition and amendment
he District Court of Page County, Iowa, for immediate
session of an overhead crane, together with beams and
leys, from the petitioner and F & W Truck Line as-
ent for the petitioner (R. 22-24, 2-5).

Respondent filed amendment to its petition on February
1954, asking for damages, in addition to the writ of
devin.

n July 26, 1951, upon filing of bond, a writ of replevin
s issued directing the sheriff to deliver the possession
said personal property to the respondent (R. 11). Peti-
ner's filed answer (date of filing is not set out in the
cord) denying respondent was the owner and entitled
the immediate possession of the property and that it
rongfully obtained it, claimed a lien for services in dis-
ssembling, loading and transportation of the property (R.
-).

Petitioner filed reply to respondent's amendment (date
t set out in Record) reiterating its claim for a lien and
s damages (R. 31).

On November 18, 1954, order and decree of the Iowa
istrict Court was filed stating the cause came on for

final order and decree, said case having been tried to [illegible] heard" and finding that the petitioner was not employed by the respondent to dismantle and load the crane and that the petitioner failed to plead and indebtedness due it under the theory of quantum meruit that would give it a lien on the crane and that respondent was the owner of said crane and entitled to the immediate possession thereof, taxed the costs against the petitioner (R. [illegible]).

On January 21, 1955, petitioner filed civil action in the United States District Court, captioned "Amended Complaint for Money and for Damages (R. [illegible]), naming respondent, P & W Truck Lines, Sheriff of Pottawattamie County, Iowa, and Mutual Surety Company as defendants, and claiming an artisan's lien under Chapter 577, Iowa Code Annotated, against the crane for services for dismantling, loading and transporting the crane and parts and in the alternative the respondent be required to return said property or its market value, which is alleged to be $[illegible], and for reasonable damages, counsel fees and expenses against all the named defendants.

Respondent filed answer in two divisions denying that the matter in controversy exceeded $3,000.00, exclusive of interest and costs, denied that petitioner performed any dismantling services on behalf of and for the benefit of the petitioner and denied that petitioner was entitled to an artisan's lien under the Iowa statutes and further that under the statute they could not assert a counterclaim for damages and that the Iowa District Court had previously found petitioner had no lien and further that all the matters and items asserted in petitioner's complaint had been fully and finally adjudicated against petitioner (R. [illegible]).

On November 14, 1955, the United States District Court, taking in consideration the amount in controversy, the pleadings and pre-trial conference (R. [illegible]), entered its

error under fourteen different headings, among them be that other parties should have been made parties in bankruptcy proceedings such as the P & W Truck Line being guilty of conversion in surrendering the machi to respondent; that the sheriff was also guilty of conv sion and the surety company be declared liable on its b filed in the replevin action.

The Circuit Court of Appeals on June 27, 1950, affir (appendix, petitioner's petition) and petitioner seeks view by this court on a writ of certiorari.

ARGUMENT

Petitioner appears to be submitting this case on its merits and as though a writ had been granted rather than satisfying the requirements with respect to seeking a writ.

This case coming on for review from a bankruptcy proceeding, jurisdiction should be invoked under the provisions of the Bankruptcy Act and not under the provisions of Section 1254 (1) of the Judicial Code. (Jurisdiction of appellate courts, Bankruptcy Act [11 U. S. C. A., Sec. 47 (c)]; 8 C. J. S., Bankruptcy, Sections 605, 625; William R. Staats v. Security Trust and Saving Bank, 243 U. S. 121, 61 L. Ed. 632, 37 S. Ct. 366; In re Lehigh, 130 F. 2d 380, 78 U. S. App. D. C. 261)

In the event this court shall determine this is not a fatal jurisdictional defect, we urge that petitioner has wholly failed to bring itself within any of the considerations governing review on certiorari under Rule 19 (b), of the rules of this court, which petitioner also invokes. (54 Am. Jur., United States Courts, Sections 239, 230, 240, 242)

In their petition, petitioners fully fail to point out, or bring to the attention of this court wherein and in what manner the Court of Appeals decided a Federal question in a way to conflict with applicable decisions of this court, and from accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision, or to set forth or indicate reasons why this court within its broad discretion, should grant writ. They should not expect this court to determine from their petitions' blanket citations of constitutional provisions, Federal and State statutes, rules and decisions, as they endeavor to determine that the Circuit Court of Appeals was in error. That is their responsibility. (54 Am. Jur., United States Courts, Section 251)

Under their headings "Questions Requested to be [illegible] viewed" and "Reasons for Granting the Writ", they [illegible] plain about the actions of the sheriff in the replevin[illegible] tion in the Iowa District Court and in addition to [illegible] sheriff, other parties, the surety or the replevin bond [illegible] "others as may be reasonably necessary for a full hear[illegible] and determination" should be brought in as defendants [illegible] the bankruptcy proceedings. As stated in the opinion [illegible] the Circuit Court of Appeals in this case: "We can th[illegible] of nothing of less concern to that Court than whether [illegible] pellant has enforceable claims against complete strang[illegible] to the reorganization proceedings" (Appendix, Petition[illegible] Petition, p. 25).

They claim violations of the 5th and 14th amendme[illegible] of the Constitution, but wholly fail in any manner to [illegible] stantiate such violations.

They assert violations of interstate commerce under [illegible] constitution, but fully fail to show that there was in[illegible] state commerce. In fact, their Record clearly shows [illegible] the dismantling, loading and transporting of the pers[illegible] property all took place in Iowa (R. 9, 10, 14, 23, 36, 56, [illegible]

Petitioner is not satisfied with the judgments and or[illegible] of the Iowa and United States District Courts, but failed [illegible] appeal to the appellate courts of those courts and now [illegible] this court to review them.

They complain about the various courts in their [illegible] ments and orders finding that evidence and testi[illegible] was taken, but fail to set out in their Record trans[illegible] of what took place that brought about such findings [illegible] if no record was made at such times to supply the R[illegible] with such evidence, documentary or otherwise, by [illegible] exception, or other statutory substitute available to th[illegible] (Section 786.1, 1958 Code of Iowa, Bill of Exceptions; [illegible] v. Hemrick, 62 Iowa 414, 17 N. W. 594; 3 Am. Jur., A[illegible]

and Error, Sections 624, 625, 646 and 648; Order 47 of the General Orders in Bankruptcy, 11 U. S. C. A., Sec. 53.)

We did our best to read and digest their incomplete and sketchy cyclopedic and text citations and their reported cases and to apply them to the questions they requested to be reviewed and where we were able to find them, we were unable, in practically all instances, to see where they were in point, had any bearing, or were of any assistance to them.

This case appears to be one that comes squarely within the provisions of Rule 23 (4) of the rules of this court as sufficient reason for denying its petition in that the petitioner has wholly and fully failed to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points for which it seeks consideration.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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